



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 281

[EPA-R09-UST-2020-0258; FRL-10013-09-Region 9]

Hawaii: Proposed Authorization of Underground Storage Tank Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Hawaii has applied to the Environmental Protection Agency (EPA) for updated authorization of changes made to its underground storage tank (UST) program under the Resource Conservation and Recovery Act (RCRA), as amended, since the previous authorization of Hawaii's UST program in September 2002. The EPA has reviewed Hawaii's application and has tentatively determined that these changes satisfy all requirements needed to qualify for the requested updated authorization. Therefore, we are proposing to authorize the State's changes. The EPA seeks public comment prior to taking final action.

DATES: Comments must be received on or before *[insert date 30 days after the date of publication in the Federal Register]*.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R09-UST-2020-0258 at <https://www.regulations.gov> or via email to pallarino.bob@epa.gov. For comments submitted at <https://www.regulations.gov>, follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from <https://www.regulations.gov>. For either manner of submission, the EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is

considered the official comment and should include discussion of all points you wish to make.

The EPA will generally not consider comments or comment contents located outside of the

primary submission (i.e., on the web, cloud, or other file sharing system). For additional

submission methods, please contact the person identified in the FOR FURTHER

INFORMATION CONTACT section. For the full EPA public comment policy, information

about CBI or multimedia submissions, and general guidance on making effective comments,

please visit <https://www.epa.gov/dockets/commenting-epa-dockets>. Publicly available docket

materials are available at <https://www.regulations.gov>. We encourage electronic submittals but if

you are unable to submit electronically, need assistance in a language other than English, are a

person with disabilities who needs a reasonable accommodation at no cost to you, or need other

assistance, please reach out to the person identified in the FOR FURTHER INFORMATION

CONTACT section.

The federal www.regulations.gov website is an “anonymous access” system, which means EPA

will not know your identity or contact information unless you provide it in the body of your

comment. If you send an e-mail comment directly to the EPA without going through

www.regulations.gov, your e-mail address will be automatically captured and included as part of

the comment that is placed in the public docket and made available on the Internet. If you submit

an electronic comment, the EPA recommends that you include your name and other contact

information in the body of your comment and with any disk or CD-ROM you submit. If the EPA

cannot read your comment due to technical difficulties and cannot contact you for clarification,

the EPA may not be able to consider your comment. Electronic files should avoid the use of

special characters, any form of encryption, and be free of any defects or viruses.

FOR FURTHER INFORMATION CONTACT: Robert Pallarino, Project Officer,

Underground Storage Tank Program Office, LND-4-3, U.S. EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, pallarino.bob@epa.gov, (415) 947-4128.

SUPPLEMENTARY INFORMATION:

A. Why are State Programs Approved?

Section 9004 of RCRA, 42 U.S.C. 6991c, authorizes the EPA to approve State UST programs to operate in the State in lieu of the federal UST program, subject to the authority retained by the EPA in accordance with RCRA. Program approval may be granted by the EPA pursuant to RCRA section 9004(b), if the EPA finds that the State program: (1) is “no less stringent” than the federal program for the seven elements set forth at RCRA section 9004(a)(1) through (7); (2) includes the notification requirements of RCRA section 9004(a)(8); and (3) provides for adequate enforcement of compliance with UST standards of RCRA section 9004(a). Note that RCRA sections 9005 (on information-gathering) and 9006 (on federal enforcement) by their terms apply even in states with programs approved by the EPA under RCRA section 9004. Thus, the EPA retains its authority under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions to undertake inspections and enforcement actions in approved states. With respect to such an enforcement action, the EPA will rely on federal sanctions, federal inspection authorities, and federal procedures rather than the state authorized analogues to these provisions.

B. Why are revisions to state programs necessary?

States that have received final approval from the EPA under RCRA section 9004(b) of RCRA, 42 U.S.C. 6991c(b), must maintain an UST program that is equivalent to, consistent with, and no less stringent than the Federal UST program. When the EPA makes revisions to the regulations that govern the UST program, states must revise their programs to comply with the

updated regulations and submit these revisions to the EPA for approval. Changes to state UST programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to the EPA's regulations in 40 Code of Federal Regulations (CFR) part 280. States can also initiate changes on their own to their UST program and these changes must then be approved by the EPA.

C. What decisions has the EPA made in this proposed rule?

On October 8, 2018, in accordance with 40 CFR 281.51(a), Hawaii submitted a complete program revision application seeking approval for its UST program revisions corresponding to the EPA final rule published on July 15, 2015 (80 FR 41566), which finalized revisions to the 1988 UST regulation and to the 1988 state program approval (SPA) regulation. As required by 40 CFR 281.20, the State submitted the following: A transmittal letter from the Governor requesting approval, a description of the program and operating procedures, a demonstration of the State's procedures to ensure adequate enforcement, a Memorandum of Agreement outlining the roles and responsibilities of the EPA and the implementing agency, a statement of certification from the Attorney General, and copies of all relevant State statutes and regulations. The EPA has reviewed the Hawaii application for updated UST Program authorization and has tentatively determined that the revisions to Hawaii's UST program are equivalent to, consistent with, and no less stringent than the corresponding federal requirements in Subpart C of 40 CFR part 281, and that the Hawaii program provides for adequate enforcement of compliance (40 CFR 281.11(b)). Therefore, the EPA is proposing to grant Hawaii approval to operate its UST program with the changes described in the program revision application as outlined below.

The EPA will consider all public comments on its proposed approval received in writing

during the public comment period. Issues raised by those comments may be the basis for a decision to deny final approval to Hawaii's request for updated authorization. The EPA will make a final decision on whether to approve the subject changes to Hawaii's program after the close of the public comment period and will give notice of it in the Federal Register. The document will include a summary of the reasons for the final determination and a response to all major comments.

D. What is the effect of this action?

This action does not impose additional requirements on the regulated community because the requirements that are the subject of this proposed rule are already effective in the State of Hawaii, and they are not changed by this action. This action merely proposes approval of the existing State requirements as meeting the federal requirements and would thereby render them federally enforceable.

E. What happens if the EPA receives comments that oppose this action?

If the EPA receives comments on this proposed action, we will address all such comments in a later final rule. You are unlikely to have another opportunity to comment. If you want to comment on this proposed authorization, you should do so at this time.

F. What has Hawaii previously been authorized for?

Hawaii initially received final authorization on September 25, 2002, effective September 30, 2002 (67 FR 60161) to implement the UST program. On September 17, 2008, the EPA codified the approved Hawaii program that is subject to the EPA's inspection and enforcement authorities under RCRA sections 9005 and 9006, 42 U.S.C. 6991d and 6991e, and other applicable statutory and regulatory provisions (73 FR 53742).

G. What changes are we proposing with today's action?

In order to be approved, each state program application must meet the general requirements in 40 CFR 281.11, and specific requirements in 40 CFR 281 Subpart B (Components of a Program Application); Subpart C (Criteria for No Less Stringent); and Subpart D (Adequate Enforcement of Compliance). This also is true for proposed revisions to approved state programs.

As more fully described below, the State has made the changes to its approved UST program to reflect the 2015 Federal Revisions. The EPA is proposing to approve the State's changes because they are equivalent to, consistent with, and no less stringent than the federal UST program and because the EPA has confirmed that the Hawaii UST program will continue to provide for adequate enforcement of compliance, as required by 40 CFR 281.11(b) and part 281, Subpart D.

The Hawaii Department of Health (HDOH) is the lead implementing agency for the UST program in Hawaii. The HDOH continues to have broad statutory authority to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases under Hawaii Revised Statutes (HRS) 342L-1 through 342L-53. The Hawaii UST Program gets its enforcement authority from the powers and duties of the HDOH Director (Director) found in HRS 342L-8. Under HRS 342L-7 the Director is authorized to require an owner to furnish records, conduct monitoring or testing, and provide access to tanks. Under the powers granted to the Director, the HDOH is authorized to issue installation and operating permits (HRS342L-31). Permits must be renewed every five years (HRS342L-4). Penalties for non-compliance with Hawaii's UST statutes may be assessed under HRS342L-10. HRS342L-32.5 allows the HDOH to place a delivery prohibition tag on a tank for failure to have, or act in accordance with, a permit, spill and overfill prevention, required tank and/or piping leak detection, corrosion

protection, or maintain financial responsibility.

Specific authorities to regulate the installation, operation, maintenance, and closure of USTs, as well as UST releases, are found under Hawaii Administrative Rules (HAR), effective July 15, 2018, section 11-280.1-1 through section 11-280.1-429 Underground Storage Tanks. Reporting and recordkeeping authorities and requirements are found under HRS section 342L-7, HRS section 342L-7.5, and HAR section 11.280.1-34. The EPA has tentatively determined that the aforementioned statutory sections and regulations satisfy the requirements of 40 CFR 281.40 and 281.41.

The State of Hawaii and the EPA have signed a Memorandum of Agreement (MOA), which will be effective at the time the EPA publishes its final decision to grant UST program approval to the changes to the State's UST program. This MOA provides that the State will continue to be the primary implementation agency for the UST Program in Hawaii and will continue to allow the EPA to conduct oversight and reviews of the State's efforts. The MOA also specifies how the EPA and the State will continue to share information.

The State's changes to its UST program do not affect the continued compliance of the State's statutes and rules with the public participation provisions contained in 40 CFR 281.42. HRS section 342L-12.5 provides that any person may intervene in any civil action to enforce the State's statutes and rules, if that person has an interest that is, or may be, adversely affected.

To qualify for approval, revisions to a state's program must be "equivalent to, consistent with, and no less stringent" than the federal program, in this case, the 2015 Federal Revisions. In the 2015 Federal Revisions, EPA addressed UST systems deferred in the 1988 UST regulations and added, among other things: new operation and maintenance requirements; secondary containment requirements for new and replaced tanks and piping; operator training requirements;

and a requirement to ensure UST system compatibility before storing certain biofuel blends. In addition, the EPA removed past deferrals for emergency generator tanks, field constructed tanks, and airport hydrant systems. The EPA analyzes revisions to approved state programs pursuant to the criteria found in 40 CFR 281.30 through 281.39.

The HDOH has revised its regulations to help ensure that the State's UST program revisions are equivalent to, consistent with, and no less stringent than the 2015 Federal Revisions. The HDOH has repealed its previous UST rules, chapter 11-281, Hawaii Administrative Rules (HAR), and adopted a new chapter 11-280.1, HAR, effective July 15, 2018. The EPA has tentatively determined that the revised HAR addresses all the requirements of 40 CFR 281.30 – 281.39 and are at least as stringent, but in some cases more stringent or broader in scope, than the federal UST regulations. Hawaii rules that are broader in scope than the federal UST rules are discussed in more detail in Section I.H. of this document.

As part of the State Application, the Hawaii Attorney General certified that the State revisions meet the requirements “equivalent to, consistent with, and no less stringent” criteria in 40 CFR 281.30 through 281.39. The EPA is relying on this certification, the analysis submitted by the State and our own review in making this decision to propose approval of the State's updated authorization application.

H. Where are the State's revised rules different from the Federal rules?

Broader in Scope Provisions

Where an approved state program has a greater scope of coverage than required by federal law, the additional coverage is not part of the federally approved program and is not federally enforceable (40 CFR 281.12(a)(3)(ii)). The following paragraphs describe the State rules that are considered broader in coverage than the federal program, as these State-only

regulations are not required by federal regulation and are implemented by the State in addition to the federally approved program.

Hawaii's definitions of "regulated substance" at HRS section 342L-1 and section 11-280.1-12 are broader in scope than the federal definitions of "regulated substance." For the most part, the definitions in the State and federal statutes and regulations are the same except that the State includes in its definitions "any other substance designated by the department that, when released into the environment, may present substantial danger to human health, welfare, or the environment." These definitions are broader in scope to the extent that Hawaii includes substances that are designated as regulated substances by the HDOH, pursuant to subsection (3) of Hawaii's definition of the term, which are neither (a) "any substance defined in section 101(14) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) of 1980 (but not including any substance regulated as a hazardous waste under subtitle C [of RCRA]" or (b) "[p]etroleum, including crude oil or any fraction thereof that is liquid at standard conditions of temperature and pressure (60 degrees Fahrenheit and 14.7 pounds per square inch absolute)."

HAR section 11-280.1-21 requires that all UST systems be upgraded to secondary containment by a firm fixed date, July 15, 2028, except for field constructed tanks and airport hydrant systems, which must be provided with secondary containment by July 15, 2038. This aspect of Hawaii's program is broader in scope than the federal program since the federal UST program does not require all UST systems to be upgraded to provide secondary containment, only newly (after the effective date of the federal UST rule) installed or repaired tanks or piping.

HAR section 11-280.1-23 and HAR section 11-280.1-42 require hazardous substance USTs to use interstitial monitoring and be secondarily contained with no exceptions. As long as

the implementing agency approves, the federal program allows hazardous substance USTs installed prior to October 13, 2015 to use alternative release detection methods if specific conditions are met. This aspect of Hawaii's program, mandating the use of interstitial monitoring as the only release detection method for all hazardous substance UST systems, is broader in scope than the federal program to the extent it applies to hazardous substance USTs installed prior to October 13, 2015, where the specific conditions referenced in 40 CFR 280.42(e) of the federal rules are met.

HAR section 11-280.1-34(a) requires notifications to the HDOH when changes are made to the UST system, which is broader in scope than the federal requirements. Federal UST rules only require notification of existing or newly installed UST systems or when UST systems are switched to storing certain regulated substances.

HAR section 11-280.1-53(b)(2) and section 11-451-6(b)(4) establish a "reportable quantity" threshold for trichloropropane of 10 lbs. Since the federal program does not require reporting of releases of trichloropropane, this requirement of the State's program is broader in scope than the federal program to this limited extent.

HAR section 11-280.1-61.1 requires owners and operators to post signs around the perimeter of a site where contamination poses an immediate health risk or where contaminated media is exposed to the surface, if the Department determines that the posting of such signs is appropriate. This requirement is broader in scope than the federal UST program, which does not include an analogous provision.

HAR section 11-280.1-67 requires public notification in the event of a confirmed release. This requirement is broader in scope than the federal UST program, which only requires public notification when an implementing agency requires a corrective action plan.

HAR 11-280.1-300 through 11-280.1-335 require permits for the installation and operation of USTs. Permits must be renewed regularly. There is no federal requirement for USTs to be permitted either at installation or during operation. This aspect of Hawaii's program is broader in scope than the federal program since the federal UST program does not include analogous permitting requirements.

HRS 342L-14 allows the Director of the Department to establish fees for department services. HAR 11-280.1-335 specifies the amounts for various fees for permit and variance applications. This provision of Hawaii's UST program is broader in scope because there are no federal requirements which address the establishment of fees for services.

Hawaii's UST program contains provisions that allow the State to grant variances. The Hawaii Attorney General's Office has indicated that such variances may be granted where State rules are broader in scope than the federal regulations. To the extent that such variances are granted, and the resulting requirements imposed pursuant to such variances are broader in scope than the federal UST requirements, the requirements imposed by such variances will not be federally enforceable as part of the authorized State program. However, to the extent that any variances are issued for aspects of the State's program that result in the imposition of requirements which are merely more stringent than the federal UST requirements, as opposed to broader in scope, the resulting requirements of such variances will be federally enforceable as part of the authorized State program. The following provisions pertain to Hawaii's variance requirements: HRS section 342L-1 (definition of "variance"); HRS section 342L-5 (variance allowed); HRS section 342L-6 (procedures for variances); HAR 11-280.1-12 (definition of "variance"); HAR 11-280.1-332 (variance allowed); and HAR 11-280.1-333 (variance applications).

II. Codification

A. What is codification, and will EPA codify Hawaii's UST program as proposed in this rule?

Codification is the process of placing citations and references to the state's statutes and regulations that comprise the state's authorized UST program into the Code of Federal Regulations. EPA does this by adding those citations and references to the authorized state rules in 40 CFR part 282. EPA is not proposing to codify the authorization of Hawaii's changes at this time. However, EPA intends to amend 40 CFR part 282, Subpart B for any updated authorization of Hawaii's program changes at a later date.

III. Statutory and Executive Order (E.O.) Reviews

This action only applies to Hawaii's UST Program requirements pursuant to RCRA Section 9004 and imposes no requirements other than those imposed by state law. It complies with applicable EOs and statutory provisions as follows:

A. Executive Order 12866 Regulatory Planning and Review, Executive Order 13563: Improving Regulation and Regulatory Review

The Office of Management and Budget (OMB) has exempted this action from the requirements of Executive Order 12866 (58 FR 51735, Oct. 4, 1993) and 13563 (76 FR 3821, Jan. 21, 2011). This action proposes to approve state requirements for the purpose of RCRA section 9004 and imposes no additional requirements beyond those imposed by state law. Therefore, this action is not subject to review by OMB.

B. Executive Order 13771: Reducing Regulations and Controlling Regulatory Costs

This action is not an Executive Order 13771 (82 FR 9339, February 3, 2017) regulatory action because actions such as this proposed approval of Hawaii's revised underground storage

tank program under RCRA are exempted under Executive Order 12866. Accordingly, I certify that this action will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.).

C. Unfunded Mandates Reform Act and Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Because this action proposes to approve and codify pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538). For the same reason, and because there are no federally recognized Tribes within the State, this proposed action also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

D. Executive Order 13132: Federalism

This proposed action will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, Aug. 10, 1999), because it merely proposes approval of state requirements as part of the State RCRA Underground Storage Tank Program without altering the relationship or the distribution of power and responsibilities established by RCRA.

E. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks

This proposed action also is not subject to Executive Order 13045 (62 FR 19885, Apr. 23, 1997), because it is not economically significant, and it does not make decisions based on

environmental health or safety risks.

F. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001) because it is not a “significant regulatory action” as defined under Executive Order 12866.

G. National Technology Transfer and Advancement Act

Under RCRA section 9004(b), the EPA grants a state’s application for approval as long as the state meets the criteria required by RCRA. It would thus be inconsistent with applicable law for the EPA, when it reviews a state approval application, to require the use of any particular voluntary consensus standard in place of another standard that otherwise satisfies the requirements of RCRA. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply.

H. Executive Order 12988: Civil Justice Reform

As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this proposed rule, the EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

I. Executive Order 12630: Governmental Actions and Interference With Constitutionally Protected Property Rights

The EPA has complied with Executive Order 12630 (53 FR 8859, Mar. 15, 1988) by examining the takings implications of the proposed rule in accordance with the “Attorney General’s Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings” issued under the executive order.

J. Paperwork Reduction Act

This proposed rule would not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). “Burden” is defined at 5 CFR 1320.3(b).

K. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low Income Populations

Executive Order 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. Because this proposed rule would approve pre-existing state rules which are at least equivalent to, consistent with, and no less stringent than existing federal requirements, and would impose no additional requirements beyond those imposed by state law, and there would be no anticipated significant adverse human health or environmental effects, the proposed rule is not subject to Executive Order 12898.

L. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA seeks public comment prior to taking final action on this proposal. The proposed rule will not become effective until the EPA makes a final decision on whether or not to approve the subject changes to Hawaii’s program and gives notice of that final decision in the Federal Register. At that time, the EPA will submit a report containing the final decision

document and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Authority: This proposed rule is issued under the authority of Sections 2002(a), 7004(b), and 9004, 9005 and 9006 of the Solid Waste Disposal Act, as amended, 42 U.S.C. 6912(a), 6974(b), and 6991c, 6991d, and 6991e.

List of Subjects in 40 CFR Part 281

Administrative practice and procedure, Hazardous substances, State program approval, Program Revisions Update, and Underground storage tanks.

Dated: July 30, 2020.

John Busterud,

Regional Administrator, Region 9.